STATE OF MICHIGAN
IN THE SUPREME COURT

DAIMLERCHRYSLER CORPORATION,

Petitioner-Appellant,

v

MICHIGAN DEPARTMENT OF TREASURY,

Respondent-Appellee.
_____/

Supreme Court No. 130106

Court of Appeals No. 262518

Michigan Tax Tribunal No. 295872

APPELLEE'S BRIEF IN RESPONSE TO THE COURT'S JUNE 2, 2006, ORDER RAISING SEVEN QUESTIONS

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Introduction

In a June 2, 2006, order, the Court directed that oral argument be scheduled in this matter to determine whether it should grant Petitioner-Appellant DaimlerChrysler Corporation's (DaimlerChrysler's) application for leave to appeal or take other peremptory action. The Court's order raises seven questions to be addressed by the parties at the preliminary oral argument. Finally, the order permits the parties to submit supplemental briefs addressing each of the seven questions raised by the Court.

In an effort to avoid the mere repetition of its brief in opposition previously filed in this matter, Respondent-Appellee Michigan Department of Treasury (the Department) will attempt to succinctly answer each specific question raised by the Court. The only facts that will be reiterated here are: (1) that DaimlerChrysler transferred motor fuel from its storage tanks into the fuel supply tanks of newly-assembled vehicles that were then loaded on transport carriers, ostensibly for export out of the State of Michigan, and (2) that DaimlerChrysler attempted to obtain a refund of the motor fuel tax (MFT) paid on the motor fuel present in the vehicles' fuel supply tanks after the vehicles were loaded on motor carriers for transport.

Issues Presented in the Court's June 2, 2006, Order

1. **Whether the Legislature's use of the word "an" end user in MCL 207.1039 was intended to be used only to describe the ultimate end user and, if not, whether other "end users" such as a "bulk end user" should be included.**

The Department does not dispute that MCL 207.1039 uses the phrase "an end user," as do MCL 207.1033, MCL 207.1041, MCL 207.1042, MCL 207.1044, and MCL 207.1045, all describing circumstances under which a person may claim a refund under the Motor Fuel Tax Act (MFTA), MCL 207.1001 *et seq.* The Legislature's use of the word "an" implies that there may be more than one type of "end user." For example, "an end user," as contemplated under the plain and commonly-understood language of the MFTA, could be a person who puts motor fuel into a race car that is operated solely within the confines of a racetrack. "[A]n end user" could be a person who takes delivery of motor fuel from a transport truck, stores the fuel in its own storage tanks, and transfers this fuel into its own vehicles that are then operated on its nonhighway test track facilities.[1] "[A]n end user" could also be a person who operates motor fuel-powered furnaces used to cure a molded product before it is placed in storage inventory.[2]

In each of these examples, the operation engaged in by the "user" results in the "end" of the motor fuel, i.e., its consumption. "[A]n end user," a "bulk end user," or an "industrial end user" are all ultimate "end users" in that they each consume, burn, expend, incinerate, destroy, wipe out, obliterate, put an end to, or otherwise transform the motor fuel. It is this result that makes a person "an end user."

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[1] This scenario describes a "bulk end user" as defined in MCL 207.1002(f). For purposes of this brief, all statutory citations are to provisions effective during the time period in issue (April 1, 2001 to June 30, 2001).

[2] This scenario describes an "industrial end user" as defined in MCL 207.1003(o).

Here, the Court of Appeals appropriately considered dictionary definitions in determining that DaimlerChrysler was not "an end user" of the motor fuel in issue[3]:

> The term "end user" is not defined in the MFTA, but is defined by a dictionary as "the ultimate user for whom a machine, [such] as a computer, or product, [such] as a computer program, is designed." *The Random House Dictionary of the English Language: Second Edition Unabridged.* Shedding additional light on the meaning of "end user," is MCL 207.1026, which equates "used or consumed" with "producing or generating power for propelling the motor vehicle." Accordingly, we hold that, for the purposes of §§ 33 and 39 of the MFTA, an end user of motor fuel is the ultimate user of the motor fuel, i.e., the party who uses the fuel to power the motor vehicle into which the fuel was placed.

Therefore, to obtain a refund under the MFTA provisions requiring one be "an end user," one must truly be an "*end* user."

2. Whether the "irrebuttable presumption" of MCL 207.1026(1) or the "rebuttable presumption" of MCL 207.1026(2) applies in this case.

MCL 207.1026 provides in part[4]:

> Except as otherwise provided in section 32, there is an irrebuttable presumption that all motor fuel delivered in this state into the fuel supply tank of a motor vehicle licensed or required to be licensed for use on the public roads or highways of this state is to be used or consumed on the public roads or highways in this state for producing or generating power for propelling the motor vehicle. This presumption does not apply to that portion of the motor fuel used or consumed by a commercial motor vehicle outside of this state.

MCL 207.1026 further provides in part[5]:

> There is a rebuttable presumption, subject to proof of exemption under this act, that all motor fuel removed from a terminal in this state, or imported into this state other than by a bulk transfer within the bulk transfer/terminal system or delivered into an end user's storage tank, is to be used or consumed on the public roads or highways in this state in producing or generating power for propelling motor vehicles. This presumption does not apply to that portion of the motor fuel used or consumed by a licensed commercial motor vehicle outside of this state.

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[3] *DaimlerChrysler Corp v Dep't of Treasury*, 268 Mich App 528, 536; 708 NW2d 461 (2005).
[4] MCL 207.1026(1).
[5] MCL 207.1026(2).

The presumptions of § 1026 relate to the *collection* of the MFT. Under § 1026(2), it is presumed that MFT must be collected *unless* proof of an exemption under MCL 207.1030 applies. Where a qualifying exemption exists, MFT need not be collected, i.e., paid. Under § 1026(1) MFT must be collected *whenever* motor fuel is brought into Michigan and placed in the fuel tank of a motor vehicle "licensed or required to be licensed for use on the public roads or highways of this state." Under § 1026(1), however, once MFT is collected, a person who paid the tax may seek a refund as permitted under the MFTA.[6]

Here, if either presumption applies to DaimlerChrysler under the present circumstances, it must be the "irrebuttable presumption" of § 1026(1). DaimlerChrysler is seeking a *refund* of MFT already collected, not claiming an *exemption from* the payment of MFT. It is to refunds that § 1026(1) applies.

Moreover, there is no dispute that the motor fuel in issue was delivered to DaimlerChrysler in Michigan. There is also no dispute that some of this fuel was placed in the fuel tanks of DaimlerChrysler's newly-assembled motor vehicles. As importantly, it cannot be disputed that these vehicles are "required to be licensed for use on the public roads or highways of this state."[7] This fact may be demonstrated by example. At the time the DaimlerChrysler transfers motor fuel into its newly-assembled vehicles, they are no different than a vehicle on cement blocks in someone's Michigan backyard. None of the vehicles could be used, i.e.,

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[6] The "irrebuttable presumption" of MCL 207.1026(1) is "irrebuttable" "[e]xcept as otherwise provided in [MCL 207.1032]." MCL 207.32 states in relevant part:

> If a person *pays* the tax imposed by this act and *uses* the motor fuel *for a nontaxable purpose* as described in [MCL 207.1033] to [MCL 207.1047], the person may seek a refund of the tax. [Emphasis added.]

[7] MCL 207.1026(1).

operated, on Michigan's public roads and highways without being properly licensed; they are thus "required to be licensed."[8]

DaimlerChrysler may argue that the newly-assembled vehicles in issue are not required to be licensed in Michigan because they are being transported by motor carrier to a different state. Accepting this argument would eviscerate the "irrebuttable presumption" of § 1026(1) of any meaning or application. Anyone could transfer motor fuel into a motor vehicle claiming that the vehicle is *intended* to be taken to a different state or *intended* to be used off-highway. Whether the vehicle is intended to be used or even capable of being used on this State's public roads and highways is entirely irrelevant for purposes of applying the "irrebuttable presumption" that the motor fuel *will be* "used or consumed on the public roads or highways in this state." This "irrebuttable presumption" applies to the collection of the motor fuel; if it is put into a vehicle as described in § 1026(1), MFT *must* be collected. Thereafter, it is up to the person subsequently, *and actually*, using the vehicle for a nontaxable purpose to seek a refund of the tax collected under the MFTA.

Here, the motor fuel in issue was delivered to DaimlerChrysler's Michigan storage tanks and placed into motor vehicles required to be licensed for use, i.e., to operate, on this State's public roads and highways. This is all that is required to invoke the "irrebuttable presumption" of § 1026(1).

3. Whether Appellant is a "bulk end user" as defined in MCL 207.1002(f) or an "industrial end user" as it was defined in MCL 207.1003(o).

The MFTA defines "bulk end user" as[9]:

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[8] An automobile, a van, a pick-up truck, or a sports utility vehicle (SUV) (vehicles of the type in issue here) are all required to be licensed to operate on the public roads and highways of this State. See MCL 257.216; MCL 257.224; MCL 257.225.

[9] MCL 207.1002(f).

> [A] person who receives into the person's own storage facilities by transport truck or tank wagon motor fuel for the person's own *consumption*. [Emphasis added.]

The plain language of this statutory definition requires one's own *consumption*. The MFTA does not define "consumption." Black's Law Dictionary, however, defines the word as common sense would dictate: "The act of *destroying* a thing by *using* it; the *use* of a thing in a way that thereby *exhausts* it."[10] (Emphasis added.)

Here, DaimlerChrysler received motor fuel into its own storage tanks. It then transferred some of this fuel into the fuel tanks of its newly-assembled vehicles and placed the vehicles onto motor carriers for ostensible shipment to out-of-state dealers. This is the extent of DaimlerChrysler's "use" of this motor fuel. The mere transfer of motor fuel from a big tank to a small tank cannot qualify the company as a "bulk end user" under the plain language of § 1002(f).

When DaimlerChrysler transfers motor fuel (e.g., 8 gallons) from its storage tank immediately into a newly-assembled vehicle's fuel tank, the same 8 gallons remain; they are just located in a different tank. Where is the "consumption?" There were 8 gallons at the beginning of the transfer and 8 gallons when the transfer was complete.[11] While DaimlerChrysler may argue that it exhausted some of its motor fuel *supply* by placing some of it in its newly-assembled vehicles, there was no exhaustion, i.e., consumption, of the motor fuel itself.[12] For these reasons, DaimlerChrysler was not a "bulk end user" under § 1002(f) when it merely transferred motor fuel from one tank to another.

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[10] Black's Law Dictionary (7th ed), p 312.

[11] The Department recognizes that some negligible spillage or evaporation might occur during the transfer process.

[12] The Department recognizes that DaimlerChrysler may withdraw motor fuel from its storage tanks, place it in its vehicles, and operate these vehicles outside the confines of Michigan's public roads or highways for testing purposes. But, this is not the motor fuel on which the company sought a refund of MFT in the present matter.

An "industrial end user" is defined as[13]:

> [A] person who incorporates motor fuel into, or uses motor fuel incidental to, *industrial processing*. Industrial end user includes a person who repackages motor fuel into containers that hold not more than 55 gallons of liquid if the motor fuel is sold or used for a tax-exempt purpose. [Emphasis added.]

"Industrial processing" means that term as defined in MCL 205.54t, part of the General Sales Tax Act, MCL 205.1 *et seq.*, and MCL 205.94o, part of the Use Tax Act, MCL 205.91 *et seq.*[14] MCL 205.54t provides[15]:

> "Industrial processing" means the activity of converting or conditioning tangible personal property by changing the form, composition, quality, combination, or character of the property for ultimate sale at retail or for use in the manufacturing of a product to be ultimately sold at retail. Industrial processing begins when tangible personal property begins movement from raw materials storage to begin industrial processing and ends when finished goods first come to rest in finished goods inventory storage.[16]

Here, any "industrial processing" engaged in by DaimlerChrysler was more than complete by the time the newly-assembled vehicles are placed on the motor carriers for ostensible transport to out-of-state retail dealers. The company claims it places a "predetermined amount" of motor fuel in the fuel tank of each newly-assembled vehicle and that a very small portion of this fuel (not at issue here) is used, i.e., undisputedly consumed, to test the vehicle off highway before being loaded on the motor carrier. There remains, however, a significant amount of motor fuel in the vehicle's fuel tank; this fuel is not used in any fashion during "industrial processing," as defined, nor used incidentally to DaimlerChrysler's industrial process.[17] It is this

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[13] MCL 207.1003(o).
[14] MCL 207.1003(q).
[15] MCL 205.54t(7)(a).
[16] The language of MCL 205.94o(7)(a) is identical to that of §§ 54t(7)(a).
[17] MCL 207.1003(o) states that an "industrial end user" includes one who repackages motor fuel under explicit circumstances. This provision carves out a very specific exception, in light of the overwhelming indicators within the MFTA that "end use" requires consumption of the motor fuel.

remaining motor fuel that is in issue here. Regarding this remaining motor fuel, DaimlerChrysler was not an "industrial end user" for purposes of seeking a refund of MFT.

Moreover, the Court of Appeals correctly determined that DaimlerChrysler was not an "industrial end user" of the motor fuel in issue for another very obvious reason[18]:

> [DaimlerChrysler] also asserts that it was an "industrial end user" as that term was defined in MCL 207.1003(o). MCL 207.1003(o) defined "industrial end user" as "a person who incorporates motor fuel into, or uses motor fuel incidental to, industrial processing." However, the evidence does not demonstrate that [DaimlerChrysler] used the motor fuel at issue "incidental to" industrial processing. The evidence is clear that [DaimlerChrysler] never used the fuel. Nor does [DaimlerChrysler] cite on appeal (nor did it in the Tax Tribunal) any evidence demonstrating that it incorporated the motor fuel into industrial processing. This Court will not search the record for factual support for petitioner's claims. [Citations omitted.]

4. Whether the transfer of the fuel from Appellant's self-storage tank to the vehicles constitutes "consumption."

As discussed in response to questions 1 and 3 above, the mere transfer of the motor fuel in issue does not constitute "consumption." Taking, e.g., 8 gallons, of motor fuel from a storage tank and placing the same 8 gallons into a vehicle's fuel tank does not expend any of that fuel.[19] This mere transfer does not constitute "end use" of the motor fuel. While this transfer might arguably constitute "use" of a person's motor fuel *supply*, there is no "end" to the 8 gallons of motor fuel.

The MFTA requires more than the mere transfer of motor fuel from one tank into another to qualify for a refund of MFT under § 32. The plain language used by the Legislature throughout the act supports this conclusion. In addition to the common sense understanding that "an end user" is one who consumes motor fuel, statutory indicators demonstrate that

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[18] *DaimlerChrysler Corp v Dep't of Treasury*, 268 Mich App 528, 537; 708 NW2d 461 (2005).
[19] Except for spillage or evaporation, the same 8 gallons could theoretically be extracted from the vehicle's fuel tank and placed back into DaimlerChrysler's storage tank.

consumption is required before a refund may be sought as "an end user." Subsection 1002(f) uses the word "consumption" in defining a "bulk end user." The MFTA's definitions of "diesel fuel" and "gasoline" each imply, at the very least, that *use* of these motor fuels involves the generation of power for the propulsion of a motor vehicle.[20] The Court may take judicial notice that the generation of power for the propulsion of a motor vehicle necessarily involves the consumption, i.e., combustion, of the diesel fuel or gasoline placed in the vehicles' fuel tanks.

"Heating oil" is defined in the MFTA as "a motor fuel . . . that is *burned* in a boiler, furnace, or stove for heating, agricultural, or industrial processing purpose."[21] (Emphasis added.) The MFTA defines "motor vehicle" in part as[22]:

> [A] vehicle that is *propelled by an internal combustion engine or motor* and is designed to permit the vehicle's *mobile* use on the public roads and highways of this state. [Emphasis added]

Each of the "presumption" provisions of the MFTA refer to the use or consumption of motor fuel "for *producing or generating power for propelling* the motor vehicle."[23] (Emphasis added.) MCL 207.1030, addressing various exemptions to the payment of MFT, provides[24]:

> Motor fuel is exempt from the tax imposed by section 8 if it is acquired by *an end user* outside of this state and brought into this state in the fuel supply tank of a motor vehicle that is not a commercial motor vehicle, but only if the fuel is retained within *and consumed from that same fuel supply tank.* [Emphasis added.]

Many of the various MFTA refund provisions speak to the "use in" a vehicle and thereby suggest that *use* of the motor fuel, for purposes of seeking a refund of MFT as "an end user,"

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[20] See MCL 207.1002(p) and MCL 207.1003(g).
[21] MCL 207.1003(i).
[22] MCL 207.1004(d).
[23] See MCL 207.1026(1) and (2).
[24] MCL 207.1030(2).

requires consumption (i.e., burning, putting an end to, exhausting, combustion, etc.).[25] Further, a review of this list of refundable uses demonstrates that the only refundable *non*consumption use of motor fuel is when it is exported from the State or "lost," and thus obviously not available for consumption by motor vehicles using Michigan's public roads and highways.

Further, MCL 207.1008 imposes MFT on "motor fuel imported into or sold, delivered, or used in this state . . ."[26] That the Legislature separated "used" from merely "delivered" (e.g., transferred from one tank to another), suggests that "use" requires consumption. This same section also plainly states the primary intent of the MFTA:

> To require persons who operate a motor vehicle on the public roads or highways of this state to pay for the privilege of using those roads or highways.

The means by which persons pay for this privilege is by paying tax on motor fuel that powers those vehicles. This primary intent again implies that the refundable use of motor fuel is in situations where it is *consumed* by persons not driving on public roads and highways of this State, not by merely transferring the motor fuel from one tank to another.

The common definitions of "end use" as well as the a myriad of statutory cues within the MFTA demonstrate that the mere transfer of motor fuel from a storage tank to the fuel tank of a vehicle does not constitute consumption of the fuel.

5. Whether, if the transfer of the fuel is "consumption," Appellant then becomes "an" end user because it is a "bulk end user."

As explained above, the mere transfer of motor fuel from one tank (e.g., bulk storage tank) to another (e.g., vehicle fuel tank) does not equate to "consumption" of motor fuel for purposes of seeking a refund of MFT. Because the motor fuel in issue was merely transferred by

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[25] See MCL 207.1033; MCL 207.1034; MCL 207.1035; MCL 207.1039; MCL 207.1041; MCL 207.1042; MCL 207.1045.
[26] MCL 207.1008(1).

DaimlerChrysler from one tank to another, it cannot be deemed a "bulk end user" as that term is statutorily defined. The Legislature plainly stated that the motor fuel must be *consumed.*[27]

Further, the Legislature required that it be consumed by the person making the refund request.[28] Simply having motor fuel in one's own bulk storage tank does not make one a "bulk *end user*." It is not until one extracts the motor fuel from the bulk storage tank *and consumes it* for a nontaxable purpose that a refund may be sought under MCL 207.1032.[29]

6. Whether placing fuel in the tanks of vehicles destined for other states is a "nontaxable purpose" that would allow for a refund under MCL 207.1008(5).

During the time period in issue, the "nontaxable purpose" language of MCL 207.1008 was contained in § 1008(6).[30] It must be stressed that this subsection states, in very clear fashion, the *intent* of the MFTA. Subsection 1008(6) neither creates nor describes a "nontaxable purpose." It merely provides that a refund may be *sought "as provided for in this act."*[31] (Emphasis added.) Furthermore, a refund is not obtained under § 1008(6). Rather, MCL 207.1032 is the statutory provision that permits a refund of MFT, and §§ 33 to 47 contain the Legislature's descriptions of what constitutes a "nontaxable purpose" to obtain a refund.[32]

As discussed in response to questions 1, 3 and 4 above, the mere transfer of motor fuel from one tank to another does not qualify DaimlerChrysler as "an end user," does not result in the company's required consumption of the fuel, and does not permit it to seek a refund under any of the descriptions of "nontaxable purpose" specifically described in the MFTA.

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[27] MCL 207.1002(f).
[28] *Id.*
[29] *Id.*
[30] 2002 PA 668 deleted § 1008(2) and renumbered the remaining subsections; the result was that, effective April 1, 2003, § 1008(6) became § 1008(5).
[31] MCL 207.1008(6)(c).
[32] MCL 207.1032.

7. **Whether MCL 207.1047 was intended to be a "catch all" provision for entities such as Appellant that do not fit within other provisions of the Motor Fuel Tax Act, MCL 207.1001 *et seq.***

The Department can do no better than the Court of Appeals in responding to this Court's question regarding the applicability of § 1047[33]:

> [DaimlerChrysler] also asserts that MCL 207.1047 provides another, "more generic" basis for a refund of motor fuel tax paid; § 47 provides:
>
> > A person may otherwise seek a refund for tax paid under this act on motor fuel pursuant to [MCL 205.30, part of the Revenue Act, MCL 205.1 *et seq.*]. However, the claim shall be filed within 18 months after the date the motor fuel was purchased.
>
> Indeed, § 32 provides that a person who uses motor fuel "for a nontaxable purpose as described in §§ 33 to 47, the person may seek a refund of the tax." It further states that the procedure for doing so is set forth in § 48. Thus, we agree that § 47 sets forth separate grounds for a refund, namely those found in MCL 205.30, which provides in relevant part:
>
> > The department shall credit or refund an overpayment of taxes; taxes, penalties, and interest erroneously assessed and collected; and taxes, penalties, and interest that are found unjustly assessed, excessive in amount, or wrongfully collected with interest at the rate calculated under [MCL 205.23] for deficiencies in tax payments.
>
> [DaimlerChrysler] asserts that, under § 47, it should be refunded motor fuel tax paid "in connection with nontaxable use of motor fuel." [DaimlerChrysler] thus argues that, regardless of whether it was an end user, it is entitled to a refund under § 47 because it used the fuel for a nonhighway purpose. However, if this were true, it would render §§ 33 and 39 meaningless because anyone who used the fuel for a nonhighway purpose would be entitled to a refund under § 47, regardless of whether they were an end user as required by §§ 33 and 39. This Court must avoid a construction that would render any part of a statute surplusage or nugatory.[34] Thus, we do not read § 47 to permit a refund of motor fuel tax paid on fuel used for any nonhighway purpose. Rather, the refund permitted in § 47 is limited to those instances listed in MCL 205.30, i.e., (1) overpayment, (2)

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[33] *DaimlerChrysler Corp v Dep't of Treasury*, 268 Mich App 528, 537-539; 708 NW2d 461 (2005).

[34] See, e.g., *Grimes v Dep't of Transportation*, 475 Mich 72, 89; 715 NW2d 275 (2006).

> erroneous assessment, (3) unjust assessment, (4) excessive amount, and (5) wrongful collection. These circumstances encompass overcharging as a result of a clerical, computational, procedural, or human errors, or the like – not simply any tax charged on fuel used for any nonhighway purpose.
> MCL 207.1032 states in part:
>
> If a person pays the tax imposed by [the MFTA] and uses the motor fuel for a nontaxable purpose *as described in* sections 33 to 47, the person may seek a refund of the tax. [Emphasis added.]

Subsections 1033 to 1045 describe in great detail what is a qualifying nontaxable purpose; § 1047 contains no description whatsoever, but refers to MCL 205.30. The Court of Appeals correctly determined that the refund provisions under the Revenue Act's general refund statute (MCL 205.30) describes those situations where a taxpayer is overcharged or overpays as a result of a clerical, computational, or like procedural errors, and have nothing to do with whether a person used the fuel for a nontaxable purpose. The Court of Appeals determination makes perfect sense. If a person overpaid MFT as a result of a computational, clerical, or procedural error, the Legislature clearly intended to ensure that the MFTA would not preclude a refund as a result of the more restrictive nontaxable purpose provisions of §§ 33 to 45. Section 1047 is anything but a "catch-all." In referring to MCL 207.30, this statutory provision simply creates an avenue for refund of MFT limited only to those circumstances where a taxpayer is overcharged or overpays MFT as a result of a clerical, computational, or like procedural errors.

Conclusion

This Honorable Court should deny DaimlerChrysler's application for leave to appeal because the requirements of MCR 7.302(B) are not met. The Tax Tribunal and the Court of Appeals each determined that DaimlerChrysler did not meet the requirements for a refund of MFT for motor fuel placed in newly-assembled vehicles in Michigan that are then loaded onto motor carriers for ostensible export. Under MCR 7.302(B)(2), the issues raised by DaimlerChrysler do not raise significant public interest concerns given the unique facts where the company is not licensed as an exporter, fails to disclose its payments, if any, of motor fuel taxes to destination states, and maintains a sales and service agreement under which title and risk of loss to the vehicles are transferred at the motor carrier within the State of Michigan.

Under MCR 7.302(B)(3), this matter involves interpretation and application of the express and plain language of the MFTA, in its use of the term "end user," and does not involve legal principles of major significance to the State's jurisprudence. DaimlerChrysler is not "an end user" of the unconsumed, i.e., uncombusted, motor fuel placed in its newly-assembled vehicles slated for ostensible export by way of motor carriers. The Court of Appeals opinion was not clearly erroneous, is not contrary to other Court of Appeals or Supreme Court decisions, and will not cause material injustice. Thus, MCR 7.302(B)(5) is not met here.

The Tax Tribunal and the Court of Appeals correctly found that there was no evidence that DaimlerChrysler was "an end user" entitling it to a refund under MCL 207.1033 or MCL 207.1039. Motor fuel is "used" when the motor fuel is taken out of storage and placed into a motor vehicle, subjecting Petitioner to liability for tax.[35] There is a difference, however, between a "user" and "an end user" for purposes of claiming a refund of MFT under the MFTA. Under

[35] See, *DaimlerChrysler Corp v Michigan Dep't of Treasury*, 258 Mich App 342; 672 NW2d 176 (2003).

the facts in this case, the "end user" eligible for a potential refund for exporting the motor fuel would be the dealer or the consumer-purchaser of the vehicle, not DaimlerChrysler. Although under certain circumstances the company may actually be "an end user" as that term is used in the MFTA (e.g., engaging in dynamometer use or vehicle testing), those activities are not in issue. Here, DaimlerChrysler transferred motor fuel into the tanks of newly-assembled vehicles that were then loaded onto motor transport for ostensible export. Regarding this activity, DaimlerChrysler was not "an end user" of the motor fuel as contemplated by the Legislature.

The Tax Tribunal correctly granted summary disposition to the agency, and that this decision was supported by competent, material, and substantial evidence on the entire record. The Court of Appeals correctly affirmed the Tax Tribunal's final decision.

Relief Sought

The Department respectfully requests that this Honorable Court deny DaimlerChrysler's application for leave to appeal in this matter.

Respectfully submitted,

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